No. 13,765

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
UNION LEAD MINING AND SMELTER COMPANY,
Bankrupt.

G. L. THOMPSON, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt,
Appellant,

vs.

R. H. DACHNER,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

Appellant herewith submits his closing brief in reply to several erroneous contentions made by the appellee.

I.

THE DISTRICT COURT IN BANKRUPTCY, HAVING ACTUAL OR CONSTRUCTIVE POSSESSION, HAS SUMMARY JURISDICTION TO DETERMINE ADVERSE CLAIMS TO PROPERTY.

Appellee's claim that the Bankruptcy Court was without summary jurisdiction is based upon two erroneous contentions: (1) that the only real preliminary question is whether appellee's claim to the money involved here is meritorious and adverse, and (2) that property cannot be in the constructive possession of the Court if the claim is adverse. (Brief for Appellee, p. 6, et seq.)

That both of these contentions are faulty is evident from a consideration of the cases cited by appellee and the authorities cited herein:

Appellee argues:

> "It is only when a claim is frivolous or merely colorable that the property is said to be in the constructive possession of the Court."
>
> Appellee's Brief, p. 6.

and again:

> "However, even a casual examination of the Federal Bankruptcy cases cited by Appellee above will demonstrate that the Bankruptcy Court does not have the constructive possession necessary to give it summary jurisdiction if Appellee's claim to retain the money 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy * * * in matters either of fact or law'."

The cases do not so hold. The unchallenged rule is:

The District Court in Bankruptcy, having actual or constructive possession, has summary jurisdiction to determine adverse claims to property.

Autin v. Piske, 24 F. 2d 626, certiorari denied 48 S. Ct. 562, 277 U.S. 601, 72 L. Ed. 1009;

White v. Barnard, 29 F. 2d 510, affirming, D.C., *In re White,* 25 F. 2d 341, certiorari denied *White v. Barnard,* 49 S. Ct. 346, 279 U.S. 848, 73 L. Ed. 992;

Mitchell v. Mitchell, 59 F. 2d 62;

Central Republic Bank & Trust Co. v. Coldwell, 58 F. 2d 721;

In re American Cork Industries, 54 F. 2d 740;

In re Display State Lighting Co., 56 F. 2d 1046;

In re Scranton Knitting Mills, 21 F. Supp. 227.

In *Autin v. Piske,* supra, the Court stated:

"The bankruptcy court has jurisdiction of a suit by the trustee to recover property of the bankrupt in the hands of third persons * * * and may exercise this jurisdiction in a summary manner through the referee, if there is no adverse claim by the said third person, or such claim is merely colorable on the disputed facts. Muller v. Nugent, 184 U.S. 1, 22 S. Ct. 269, 46 L. Ed. 405; Harrison v. Chamberlin, 271 U.S. 191, 46 S. Ct. 467, 70 L. Ed. 897. *And, if the property is actually or constructively in the custody of the Court, this jurisdiction may be exercised, regardless of the character of the adverse claim.* Whitney v. Winman, 198 U.S. 539, 25 S. Ct. 778, 49 L. Ed. 1157; Taubel, etc., Co. v. Fox, 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770." (Italics ours.)

In *Irvy v. Corey,* 95 F. 2d 963, the Court said:

> "If the claim is real and adverse, and the res is not within the actual or constructive possession of the bankruptcy court, it is without power to adjudicate the invalidity of such claim, except in plenary proceedings."

The Supreme Court of the United States in *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770, said:

> "Whenever the bankruptcy court had possession, it could, under the act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision 'e' of section 67, under subdivision 'b' of section 60 and under subdivision 'e' of section 70. But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

Accord:

Cline v. Kaplan, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed.

(See opening quote appellee's brief, p. 4.)

That constructive possession is sufficient to visit summary jurisdiction in the Bankruptcy Court. The Supreme Court of the United States in *Taubel-Scott-Kitzmiller Co. v. Fox,* supra, stated the proposition as follows:

> "The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient."

It is therefore apparent that summary jurisdiction exists in the Bankruptcy Courts if (1) The claim is not adverse and substantial, or (2) If the property passed to the constructive possession of the Bankruptcy Court; either by itself, is sufficient to vest summary jurisdiction in that court.

That the property was in the constructive possession of the court was demonstrated in appellant's opening brief. Appellee's sole argument in opposition to the principles offered by appellant is that constructive possession cannot exist where the property is held under an adverse claim. That this is an erroneous concept has been demonstrated.

II.

APPELLEE'S CLAIM IS NOT ADVERSE.

As to the contention of appellee that his claim is adverse, bona fide and substantial, he does not favor this Court with any authority to support the assertion.

He merely advances the novel theory that:

> "Appellant is quite willing to use the Nevada State Court proceedings after the Bankruptcy as long as the results were favorable to him, but after the first Nevada Supreme Court reversal, he refuses to recognize the subsequent Nevada pro-

ceedings which resulted in the holding favorable to Appellee."

Nothing could be further from the truth. It is not a question of accepting and rejecting, but rather, it is a question of the legal effect of the original reversal and the legal effect of the subsequent actions of that Court. Certainly, the Nevada Court had the power and jurisdiction to reverse a judgment and, when it did, the legal effect of its action was to restore the parties to the status quo—thus placing the funds seized in the constructive possession of the Bankruptcy Court. Those Courts, thereafter, in an impersonam action, could not bind the appellant. They were even without power to determine that he had a good claim.

4 *Collier on Bankruptcy* 964;
Pepper v. Litten, 308 U.S. 295, 60 S. Ct. 238;
U. S. Fidelity & Guarantee Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055.

Appellee then insists that it is the position of appellant that when a judgment is reversed the party who won in the trial Court and lost in the Appellate Court must, in all cases, make restitution to his opponent. Appellant does not so contend. It is appellant's contention however that appellee, in this case, must, under accepted principles of law, make restitution to appellant.

Appellee does not deny that under general principles, restitution must be made, but rather contends that a party need not make restitution in all cases. In other words, he admits the rule but says he is within

the exception to the rule. Specifically, he sets up the exception enunciated by the Restatement on Restitution, section 74:

> "1. Unless restitution would be inequitable or the parties contract, that payment is to be final."

As for the first part of this exception, the shoe is on the other foot. It would be inequitable if restitution were not made as restitution would benefit all creditors, including appellee rather than to permit one to benefit to the exclusion of others. But, aside from this concept, the factual situation here does not fit within the scope of the exception. Witness the Restatement in section 74(c):

> "*When restitution is inequitable:* The creditor cannot normally obtain an advantage from having secured a judgment which is subsequently reversed so that, in the absence of special circumstances, it is not a defense that the claim which was the basis of the action can now be proved. Nor is restitution denied because the payor had a moral duty to make the payment. Nor is change of position a defense to the creditor."

Likewise in Sec. 74(o): "Rights of other creditors of execution debtor."

> "Upon the reversal of a judgment, the defeated judgment creditor obtains no rights because of the judgment or execution, but is relegated to the position he occupied before the judgment. He therefore gains no priority over other creditors of the debtor by virtue of the judgment either as to the subject matter of the action or as to money paid."

As far as the second proposition is concerned namely, "or the parties contract that payment is to be final," it cannot seriously be contended that this exception is available. How can a bankrupt make such a contract after bankruptcy: Here such a contract would have had to be made some time after June 25, 1948 (date of reversal)—some five (5) months subsequent to adjudication in bankruptcy. (February 9, 1948—date of adjudication as a bankrupt.) It is apparent that this exception is not applicable.

Appellee asserts that California cases are in full accord with these exceptions and cites *Schubert v. Bates*, 30 Cal. 2d 785, in support thereof. Examination of that case indicates that it supports the points set forth by the appellant in their entirety.

There, petitioners brought suit as plaintiffs, in an unlawful detainer action. They had received a certificate of eviction from OPA, subsequent to which notice to quit was served on defendants. Judgment was rendered in favor of petitioners and defendants vacated the premises. Petitioners then took possession of the property and sold it. Defendants filed an appeal and the judgment was reversed. Petitioners then filed a motion to dismiss and on the same day defendants filed a motion for restoration of possession. Defendants' motion was granted from petitioners sought certiorari.

The Supreme Court of California affirmed the order of restitution stating:

> "In other words, while the plaintiff has the right to dismiss the action before trial, where no counterclaim or request for affirmative relief has

been filed that right, after a trial and reversal of the judgment, is subject to the right of the defendant to restoration of benefits lost by virtue of the erroneous judgment. The court has inherent power to enforce that, unaffected by the right of the plaintiff to dismiss the action. The existence of the power to restore benefits after reversal flows from the rule that upon reversal the action is as though it had never been tried and the court will, where justice requires it, place the parties as nearly as may be in the condition in which they stood previously."

That this case is of no assistance to appellee is obvious, it, as well as the many cases cited by the appellant impose the burden of making restitution where a judgment has been reversed and remanded for a new trial.

CONCLUSION.

For the reasons stated in this reply, as well as those set forth in our opening brief, it is respectfully submitted that the judgment of the Honorable District Court should be reversed and the matter be returned to the Honorable District Court for issuance of a turnover order.

Dated, San Francisco, California,
January 11, 1954.

Respectfully submitted,
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